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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ROBERT JOSEPH BARBA, SR.,

Plaintiff and Respondent,

v.

WAL-MART TRANSPORTATION, LLC,  
et al.,

Defendants and Appellants.

B213376

(Los Angeles County  
Super. Ct. No. KC050252)

APPEAL from a judgment of the Superior Court of Los Angeles County, Peter J. Meeka, Judge. Affirmed.

McElfish Law Firm, Raymond D. McElfish, Noelle M. Natoli-Duffy and Jose C. Massó IV for Defendants and Appellants.

Lewis, Marenstein, Wicke, Sherwin & Lee, Jeffrey L. Horwith and Justin D. Feldman for Plaintiff and Respondent.

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Robert Joseph Barba, Sr. was injured when the police car he was driving in the course and scope of his employment as an officer for Hacienda La Puente Unified School District (School District) was struck by a tractor trailer owned by Wal-Mart Transportation, LLC (Wal-Mart) and driven by Melvin Duard Deeds. Following a jury trial at which liability was admitted, the jury awarded Barba \$76,850. Wal-Mart and Deeds appeal from the judgment, contending the trial court erred in failing to reduce the award by the full amount of workers' compensation benefits paid to Barba. We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

#### *1. Overview of the Proceedings*

On March 16, 2007 Barba filed a personal injury complaint against Wal-Mart and Deeds alleging Deeds was negligently driving the tractor trailer that hit the back of his police car on June 22, 2005.<sup>1</sup> On September 14, 2007 the School District filed a complaint-in-intervention seeking to recover the workers' compensation benefits it had paid Barba.

In May 2008, after Wal-Mart and Deeds had stipulated they were liable for the accident, trial began to determine Barba's damages. Barba contended the accident had caused injuries to his back, neck and shoulder, resulting in his need for shoulder surgery more than one year after the accident. Wal-Mart and Deeds conceded the accident caused some injury to Barba's back and neck, but disputed it caused any injury to his shoulder, and on that basis, among others, contested the amount of damages sought.

The School District had originally denied Barba's application for workers' compensation benefits for his injured shoulder, concluding (as Wal-Mart and Deeds contended at trial), unlike his neck and back injuries, Barba's shoulder injury had not been caused by the accident with the Wal-Mart truck. That decision was ultimately reversed, and Barba was paid a total of \$72,566.56 in workers' compensation benefits. After filing its complaint-in-intervention, however, the School District did not participate

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<sup>1</sup> The complaint also named Wal-Mart Stores, Inc. as a defendant, but the company was dismissed prior to trial.

in the trial because it assigned its workers' compensation lien in the full amount of \$72,566.56 to Wal-Mart and Deeds for a \$42,000 charitable contribution to the School District.<sup>2</sup>

2. *Evidence of Causation and Damages Introduced at Trial*<sup>3</sup>

a. *Barba's evidence*

Barba testified he saw Dr. Oscar Tuazon, a doctor selected to treat him by the School District, the day after the accident. After complaining his entire back hurt, "from my waist all the way up to my neck, to both my shoulders," Dr. Tuazon prescribed medication and physical therapy for Barba. After several weeks of physical therapy and follow-up visits with Dr. Tuazon, he referred Barba to Dr. Bruce Brown.

Barba saw Dr. Brown on July 21, 2005, complaining of back and neck pain. Barba explained by "back and neck" he meant "from my waist, all the way up to my neck and to my shoulder." Dr. Brown recommended Barba continue physical therapy and taking his medication and cleared Barba to return to work, but restricted to light duty.

Barba testified he went back to the doctor after several weeks because he was still in pain. After more physical therapy Barba was returned to full duty in late 2005 even though, according to Barba, he was still in pain in his "back area," again defined by Barba to include his shoulder. Barba informed Judith Watson, a claims adjuster with the School District's administrator for workers' compensation claims, he did not believe he was being treated properly. Watson told Barba he could see a doctor of his own choice.<sup>4</sup>

Barba first saw Dr. Daniel Kharazzi, an orthopedic surgeon specializing in arthroscopic surgery of the shoulder and knee, in June 2006. After examining Barba, Dr.

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<sup>2</sup> The settlement agreement between the School District, on the one hand, and Barba and Wal-Mart, on the other hand, was not signed, nor was the complaint-in-intervention dismissed, until after the jury returned its verdict.

<sup>3</sup> Only the evidence regarding the disputed shoulder injury is relevant to the appeal.

<sup>4</sup> Watson testified, when Barba called her on November 16, 2005 to request permission to return to the doctor for further treatment, he complained "his shoulder was killing him."

Kharazzi concluded he had a partial tear in his right shoulder rotator cuff. Dr. Kharazzi performed arthroscopic surgery on October 6, 2006, which confirmed the partial tear. Dr. Kharazzi testified he saw no evidence of long-term degeneration. Dr. Kharazzi also testified some patients confuse a shoulder injury with neck pain because shoulder pain does not always present itself in the exact location of the injury. Dr. Kharazzi stated, based on the information and medical history Barba had provided him and his review of some of Barba's medical records after the accident, he believed the shoulder injury occurred during the accident.

The deposition testimony of Dr. Roger Sohn was read to the jury. Dr. Sohn had been retained to evaluate whether the accident caused Barba's shoulder injury after the School District's administrator in June 2006 declined Barba's application to add the shoulder injury to his workers' compensation claim.<sup>5</sup> Dr. Sohn, who examined Barba on February 7, 2007, concluded Barba's shoulder injury had been caused by the accident.

b. *Wal-Mart and Deeds's evidence*

Wal-Mart and Deeds presented evidence the accident did not cause Barba's shoulder injury through cross-examination of Barba's witnesses and by the direct testimony of Dr. Brown and two expert witnesses. During cross-examination of Barba, for example, it was established the workers' compensation form signed by Barba in connection with the 2005 accident reported his injuries as "headaches, neck pain, upper back pain," but failed to mention any injury to his shoulder.<sup>6</sup> During cross-examination of Dr. Kharazzi it was established Barba had previously suffered injuries to his right

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<sup>5</sup> The letter to Barba declining his application in part stated, "After careful consideration of all the information, we have concluded that we cannot pay you benefits for your right shoulder, right upper back, headaches, as claimed on the application. The decision is made because there is no medical evidence to support the body parts of your claims. The accepted body parts are cervical thoracic and lumbar."

<sup>6</sup> On several occasions during trial witnesses pointed to areas of the shoulder without the witnesses or counsel identifying for the record precisely what areas were being described. As a result, our ability to review the trial record is necessarily limited.

shoulder that he did not disclose to Dr. Kharazzi—information Dr. Kharazzi acknowledged would have been important.

Dr. Brown testified he diagnosed Barba with “cervical spine sprain, possible cervical disk disease, thoracic spine sprain and lumbar spine sprain soft.” When asked his opinion about Dr. Kharazzi’s testimony Barba had sustained a rotator cuff tear in the accident that was present when Dr. Brown treated him, Dr. Brown—who during the prior 20 years had operated on a thousand or more shoulders—stated, “I never really got complaints . . . that would be consistent with a rotator cuff tear. Most of the people who come in with a rotator cuff tear, complain of anterior shoulder pain. They complain of difficulty in lifting their arm. They complain of problems with rotation. I just didn’t get any of that type of history. . . . It may have been there and it wasn’t symptomatic and therefore I didn’t treat it. But for the most part, I didn’t have that kind of history that would lead me to believe he had a shoulder injury . . . .”

Dr. Jacob Tauber, an orthopedic surgeon with extensive experience treating shoulder injuries, testified he reviewed Barba’s medical records, including photographs of the arthroscopic surgery taken by Dr. Kharazzi. Dr. Tauber opined Barba’s complaints of shoulder pain and need for surgery resulted from repetitive use, which can result in a partial or even complete rotator cuff tear, not the accident. Dr. Tauber stated that, even though Dr. Kharazzi had testified there was no evidence of wear and tear to Barba’s shoulder, Dr. Kharazzi’s postoperative report included a diagnosis of “glenohumeral chondromalacia,” which means the joint surface was worn down—a diagnosis that does not result from a one-time injury. Dr. Tauber also testified, if Barba had torn his rotator cuff during the accident, he would have experienced immediate and significant shoulder pain, as well as ongoing pain reaching for things in everyday life. There was no such indication of any such pain in Barba’s medical records.

c. *Evidence of medical expenses generally associated with treatment of a shoulder injury*

Barba did not present any evidence of his medical expenses, either through testimony or by introducing his medical bills. The only evidence of damages relating to

medical treatment was Dr. Kharazzi's testimony that generally six months of physical therapy and doctor visits for a shoulder injury similar to Barba's would cost between \$5,000 and \$10,000 and the cost for shoulder surgery, including all pre- and post-surgery doctor visits and post-surgery physical therapy, would be in the range of \$35,000 to \$55,000.

3. *The Special Verdict; the Trial Court's Reduction of the Judgment by \$12,500 for Workers' Compensation Benefits Previously Paid to Barba*

The jury awarded Barba \$76,850 in damages. On the special verdict form prepared by Barba, the jury identified the damage components as past economic loss of \$18,740, comprised of \$8,000 for past medical expenses and \$10,740 for past lost earnings; future economic loss of \$20,000 for medical expenses with \$0 for future lost earnings; past noneconomic loss, "including physical pain/mental suffering" of \$28,110; and future noneconomic loss of \$10,000. The special verdict, which included the question, "What are Robert Barba's total damages," did not require the jury to specify which injuries were caused by the accident or separately identify to which of Barba's claimed injuries the damages related.

In posttrial motions the parties requested the trial court determine the amount the judgment should be reduced in light of the workers' compensation benefits previously paid to Barba. After extensive briefing and argument the court found, although the special verdict was silent on the point, the jury had found Barba's shoulder injury was not caused by the collision and did not award Barba damages for it. Accordingly, the court found the judgment should be reduced only by \$12,500, the amount of the workers' compensation benefits paid to Barba that related to his neck and back injuries. The court ordered the judgment reduced to \$64,350.

## **CONTENTIONS**

Wal-Mart and Deeds do not challenge the judgment or the underlying special verdict in their capacity as defendants in the action. Rather, as the assignees of the School District's workers' compensation lien, they contend the trial court erred in failing to reduce the judgment by the total lien amount because the jury found the accident had

caused Barba's shoulder injury. Wal-Mart and Deeds alternatively contend, even if the jury did not find the accident caused Barba's shoulder injury, the judgment should nevertheless be reduced by the full amount of the lien because it is not subject to division.

## DISCUSSION

### 1. *Principles Governing Recovery on Workers' Compensation Liens*

When an employee has been injured during the course and scope of employment by the tortious act of a third party, an employer who has paid workers' compensation benefits to the injured employee may seek reimbursement from the third party. (Lab. Code, § 3852;<sup>7</sup> *Mendenhall v. Curtis* (1980) 102 Cal.App.3d 786, 790 (*Mendenhall*).) "The employer may enforce his right to reimbursement by applying for a lien against any judgment recovered in an action by the employee (§ 3856, subd. (b)); he may sue the third party directly (§ 3852); or he may join as a plaintiff or intervene in an action brought by the employee (§ 3853)." (*Mendenhall*, at p. 790; see *Draper v. Aceto* (2001) 26 Cal.4th 1086, 1088 (*Draper*) ["[t]o obtain reimbursement for the cost of the benefits paid to the employee, the employer may bring its own action against this third party, or it may intervene in the employee's personal injury action"].)<sup>8</sup>

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<sup>7</sup> Labor Code section 3852 provides in part, "The claim of an employee . . . for compensation does not affect his or her claim or right of action for all damages proximately resulting from the injury or death against any person other than the employer. Any employer who pays, or becomes obligated to pay compensation, or who pays, or becomes obligated to pay salary in lieu of compensation . . . may likewise make a claim or bring an action against the third person. In the latter event the employer may recover in the same suit, in addition to the total amount of compensation, damages for which he or she was liable including all salary, wage, pension, or other emolument paid to the employee or to his or her dependents."

Statutory references are to the Labor Code.

<sup>8</sup> As discussed, Wal-Mart and Deeds acquired the School District's right to reimbursement by purchasing the workers' compensation lien. (See *Engle v. Endlich* (1992) 9 Cal.App.4th 1152, 1164, 1165 ["a workers' compensation lien is assignable"; assignee "pays valuable consideration therefor and *steps into the shoes of the employer*"].)

An employee's claim for workers' compensation benefits "does not affect his or her claim or right of action for all damages proximately resulting from the injury or death against any person other than the employer." (§ 3852.) However, just as the employee is limited in a third party action to recovery of only those damages proximately caused by the injury, so too "the employer's (or carrier's) action for reimbursement is similarly limited to recovery for damages proximately caused by the injury." (*Breese v. Price* (1981) 29 Cal.3d 923, 928 (*Breese*)). "Substantively, as well as procedurally, employer and employee actions are interchangeable: regardless of who brings an action, it is essentially the same lawsuit." [Citation.] Section 3852 does not enlarge the tort remedy of a compensation carrier beyond that of the injured employee." (*Breese*, at p. 928.)

## 2. *The Trial Court Properly Interpreted the Special Verdict*

When no objection is made that a special verdict is ambiguous or incomplete before the jury is discharged, "it falls to the 'trial judge to interpret the verdict from its language considered in connection with the pleadings, evidence and instructions.'" [Citations.] Where the trial judge does not interpret the verdict or interprets it erroneously, an appellate court will interpret the verdict if it is possible to give a correct interpretation. [Citations.] If the verdict is hopelessly ambiguous, a reversal is required, although retrial may be limited to the issue of damages." (*Woodcock v. Fontana Scaffolding & Equipment Co.* (1968) 69 Cal.2d 452, 457 (*Woodcock*)). Our review of the trial court's interpretation of a special verdict is de novo. (See *id.* at pp. 455, 459; *Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1093 [special verdict included internally inconsistent findings regarding plaintiff's damages, particularly in light of uncontroverted expert testimony]; see also *City of San Diego v. D.R. Horton Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 678 ["special verdict's correctness must be analyzed as a matter of law"]).

Wal-Mart and Deeds contend Barba offered no evidence that would have allowed the jury to determine the separate value of each of his injuries. Considering the substantial evidence Barba presented that the accident caused his shoulder injury, the instructions to the jury it must determine damages for all of Barba's injuries and the



wording of the special verdict that the jury should specify Barba's "total damages," they argue the only "safe conclusion" is that the jury found the accident caused Barba's shoulder injury. This proposed interpretation of the special verdict is utterly inconsistent with what actually occurred in the trial court.

To be sure, there was substantial evidence introduced by both sides supporting their respective positions concerning the extent of the injuries caused by the accident. However, in view of Dr. Kharazzi's testimony that shoulder surgeries like Barba's cost between \$35,000 and \$55,000, the jury's award of \$8,000 for past medical expenses (the approximate midpoint for the estimated cost of physical therapy and doctor visits, according to Dr. Kharazzi) supports only the conclusion the jury found the accident did not cause Barba's shoulder injury.<sup>9</sup>

The jury instructions and wording of the special verdict form do not compel a different conclusion. Although, as Wal-Mart and Deeds emphasize, one portion of the instructions direct the jury to award Barba damages for all his injuries, read in full the instructions make clear the jury was to award damages only for injuries caused by the accident.

Finally, the Supreme Court's analysis in *Woodcock*, *supra*, 69 Cal.2d 452, upon which Wal-Mart and Deeds rely, is not inconsistent with the trial court's interpretation of the special verdict. In *Woodcock* "[t]he heart of [the] controversy [was] the question whether 'damages in the sum of \$13,000.00' represent[ed] the total or gross amount of damages to plaintiff or a reduced or net amount of damages after exclusion of [workers' compensation benefits] payments made to plaintiff by intervener." (*Id.* at p. 455.) The Court held the trial court incorrectly interpreted the ambiguous verdict "as representing the net or reduced amount of damages after exclusion of the workmen's compensation benefits previously paid to [the] plaintiff" in light of "the pivotal instruction" that

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<sup>9</sup> Indeed, during his closing argument counsel for Wal-Mart and Deeds argued, "[P]ast economic loss, all that means is the treatment from June to December. What is it worth? I will take 5- to 10 grand. That's what Dr. Kharazzi said. It is not based on bills, but so what, who cares? It happened. Let's pay it."

“commanded the jury to ‘determine the full amount of the damages.’” (*Id.* at pp. 457, 459.) Unlike the case at bar, however, in *Woodcock* there was no question that the defendant’s wrongful conduct proximately caused the plaintiff’s injury.<sup>10</sup> Thus, the fact the juries in both *Woodcock* and the instant case may have been similarly instructed to award a gross amount of damages is irrelevant to the issue whether the jury found the accident proximately caused all or just some of Barba’s claimed injuries.

3. *No Workers’ Compensation Lien Reimbursement Is Proper for Benefits Paid for Injuries Not Caused by Wal-Mart and Deeds’s Tortious Conduct*

Even if the jury found the accident caused only Barba’s neck and back injuries, Wal-Mart and Deeds contend, as the owners of the workers’ compensation lien, they are entitled to reimbursement for the full amount of benefits paid to Barba because a workers’ compensation lien may not be divided. Wal-Mart and Deeds’s argument, based on limited excerpts from opinions considering different issues, is inconsistent with the basic principle, clearly enunciated in *Breese, supra*, 29 Cal.3d at page 928, that an employer’s action for reimbursement is “limited to recovery for damages proximately caused by the injury.”

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<sup>10</sup> Wal-Mart and Deeds contend Barba’s failure to write several narrower questions directing the jury to determine causation with respect to each alleged injury requires the special verdict, under basic contract principles, to be construed against him as the drafter of the document. Principles of contract interpretation, however, are inapplicable. Wal-Mart and Deeds had as much of an obligation as Barba to ensure an unambiguous verdict. Indeed, Wal-Mart and Deeds appear to have made a calculated decision not to seek clarification of the special verdict form even though they knew it was ambiguous. During posttrial proceedings counsel informed the trial court, “[Barba] certainly knew there was going to be a question of the reduction which would required that there would be some breakout in how this award was issued under [*Breese*]. [Barba] could have asked for a verdict form to specify what damages were being awarded for neck and back, what damages were being awarded for the shoulder. . . . That could have been done, and it was his verdict form. We actually didn’t oppose the verdict form on that very basis. We knew that he was the one that was supposed to figure out how the breakout was supposed to occur.” Wal-Mart and Deeds’s decision to remain silent constituted consent (acquiescence) to the form of the special verdict about which they now complain. (Cf. *Mt. Holyoke Homes, LP v. California Coastal Com.* (2008) 167 Cal.App.4th 830, 842.)

In *Mendenhall*, *supra*, 102 Cal.App.3d 786, for example, as Wal-Mart and Deeds emphasize, the court stated, “Courts and commentators have interpreted section 3854 to mean that in an employer’s third party action, the amount of workers’ compensation benefits which the employer has paid or has been obligated to pay constitutes the minimum damage suffered by the employer and that the third party is precluded from litigating the reasonableness of that amount.” (*Mendenhall*, *supra*, 102 Cal.App.3d at p. 791.) But Wal-Mart and Deeds ignore the fact the *Mendenhall* court reversed the trial court’s award to the employer of the full amount of the employee’s workers’ compensation benefits in light of the special verdict finding, as between the employee and the defendant, the defendant’s conduct, although negligent, was not a proximate cause of the employee’s injuries: “We have found no case, however, construing the Labor Code sections (§§ 3852, 3854, 3855) as foreclosing the third party from litigating the question whether his tortious conduct was a proximate cause of any injury to the employer. Indeed, as the court in *Board of Administration v. Ames* [(1963) 215 Cal.App.2d 215,] 224, stated: “‘Defendant’s [third party’s] liability is not determined in the Industrial Accident Commission proceeding. It is determined in this action. If the trial court had found that Hanson’s [employee’s] injuries were not caused by defendant’s negligence plaintiff [employer] could not have prevailed.’ In the case at bench, in order to establish defendant’s liability for the workers’ compensation benefits paid by the county, it was incumbent upon the county to prove not only that defendant was negligent but that such negligence was a proximate cause of the employee’s injuries.” (*Mendenhall*, at p. 792.)<sup>11</sup>

Similarly, in *Draper*, *supra*, 26 Cal.4th 1086, cited by Wal-Mart and Deeds, the Supreme Court stated, “If the third party action or actions result in a recovery, either by

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<sup>11</sup> Wal-Mart and Deeds contend *Breese*, *supra*, 29 Cal.3d 923 is distinguishable because that case was brought under section 3854 (action by employer alone) while this case was brought under section 3855 (action brought by employee alone or joined by employee). *Mendenhall*, however, which was cited with approval in *Breese*, was also brought under section 3854 and makes clear the proximate cause analysis is identical whether the action is brought under section 3854 or section 3855.

settlement or by judgment, the employer's subrogation claim has priority and the employee is entitled only to the amount, if any, remaining after full reimbursement of the employer for benefits it has paid to the employee." (*Id.* at p. 1088.) As was true in *Woodcock, supra*, 69 Cal.2d 452, however, in *Draper* there was no dispute the defendant's wrongful conduct caused all of the plaintiff's injuries at issue in the case. The Supreme Court's recognition in that specific (and limited) context of an employer's entitlement to "full reimbursement" for benefits paid is not properly uprooted and made to stand for the far different proposition Wal-Mart and Deeds advance that an employer is entitled to reimbursement for benefits paid to the employee for injuries a jury has found were not proximately caused by the third party's wrongful conduct—a proposition, as we have previously noted, directly at odds with *Breese, supra*, 29 Cal.3d at page 928 ("In so describing the admissible evidence, [§ 3854] clearly contemplates reimbursement for those payments only which were made 'by reason of' the injury. The statutory language does not suggest any abandonment of the traditional concepts of 'proximate cause' or 'reasonableness' in defining the damages recoverable by an employer within this context.").

The trial court did not err in deducting from the judgment only the portion of the lien pertaining to workers' compensation benefits paid for Barba's neck and back injuries—the only injuries the jury found had been caused by Wal-Mart and Deeds's negligent conduct.

### **DISPOSITION**

The judgment is affirmed. Barba is to recover his costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.